FILE COPY

Office - Supreme Court, U
FILED
SEP 29 1948
CHARLES ELMORE CROPL
CLER

Supreme Court of the United States.

OCTOBER TERM, 1948.

No. 324

MYRON E. PIERCE ET AL.

v.

CITY OF BOSTON.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

RICHARD WAIT,
Attorney for appellants.

Of Counsel:
MAYO A. SHATTUCK,
WILLIAM C. MADDEN.

ADDISON C. GEORGE & SON, LAW PRINTERS, BOSTON.

POOR COPY

Supreme Court of the United States.

OCTOBER TERM, 1948.

No.

MYRON E. PIERCE ET AL.

v.

CITY OF BOSTON.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

This is one of two companion cases, the other being *McCarthy* v. *Boston*, both decided in the one opinion by the Supreme Judicial Court of Massachusetts, both presenting the same substantial issue that the proposed construction of an underground garage in Boston Common in accordance with the provisions of Massachusetts Statute 1946, chapter 294, will constitute a breach of trust by the appellee and consequently that that statute violates the contract clause of the Constitution of the United States, and both appealed to this Court. In each the City of Boston is the sole appellee. Certain of the appellants are parties in both cases although the duplication is not complete. The grounds upon which the appellants assert that this Court has jurisdiction are identical. In each the appellee has filed an identical motion to dismiss or affirm for lack of jurisdiction and an essentially identical statement opposing jurisdiction. In the companion case the appellants are filing a brief containing a reasoned argument in

support of the jurisdiction asserted in both cases. Everything argued in that brief is fully applicable in this case. Obviously there is no occasion to burden the Court with a completely repetitious brief. The appellants in this case consequently beg leave to refer the Court to the appellants' brief in *McCarthy* v. *Boston* and adopt that brief as their own.

In the *McCarthy* case the appellants allege that the trust which they assert will be violated by the statutory action was created by the acceptance by the appellee of the bequest under the will of George Francis Parkman, who died in 1909. In this case the appellants go further and allege that prior to 1909 the appellee had for upwards of three centuries held Boston Common under trusts which were then supplemented by the Parkman trust. The fashion in which the trust is alleged to have been established and the time when it first came into existence differ in the two cases. The effect of the construction of the garage in accordance with St. 1946, c. 294, as a breach of the trust and the consequent impairment of the obligation of contract is identical.

One additional matter only requires reference here. In its answer to the original petition the appellee made as its final allegation:

> "7. So long as there is any question of the authority of the City of Boston to act under said Chapter 294 the City of Boston cannot proceed thereunder."

It then went on to pray affirmatively for the entry of a declaratory judgment under an appropriate state procedural statute:

> "1. To declare that Chapter 294 of the Acts of 1946 is constitutional.
>
> "2. To declare that the City of Boston is authorized and empowered to act under and in accordance

POOR COPY

with the provisions of Chapter 294 of the Acts of 1946."

The appellee consequently recognized specifically that construction of the garage could not be undertaken without the sanction of the statute. Yet its argument in support of the motion to dismiss or affirm is based upon the proposition that the determination that the statute was constitutional and consequently gave the required sanction was not essential to the decision, and further that the lower court did not in fact decide in favour of its validity.

To this end it is stated in the statement opposing jurisdiction:

> "The Court below expressly refused to grant that declaration (Opinion, Mass. Adv. Sh. (1948) p. 635), and thus expressly refused to adjudicate that the statute was valid."

And again, in the next paragraph:

> "It appears affirmatively from the opinion that the Supreme Judicial Court expressly refused to adjudicate that the statute was valid."

But what the Supreme Judicial Court said was this:

> "It is doubtful whether the city is entitled to an adjudication that St. 1946, c. 294, is valid by reason of its failure to give notice to the Attorney General in accordance with c. 231A, § 8. See Borchard, Declaratory Judgments (2d ed.) 275. *We have decided that the statute is valid;* and as a formal adjudication to that effect would not confer any benefit or advantage upon the city in addition to that enuring to it by virtue of this opinion, we see no necessity of including it in a declaratory decree. G. L. (Ter. Ed.) c. 231A, § 3." (Emphasis supplied.) (Adv. Sh., p. 635.)

In other words, the only reason why the formal adjudication was not made was the procedural doubt and the conclusion that it would add nothing to the decision contained in the opinion. U.S. Code, Title 28, § 344, which defines this Court's jurisdiction, does not require a formal adjudication. Its reference is to the decision, not to the judgment. The specific language is:

> ". . . and the decision is in favor of its validity . . ."

The equally specific language of the Massachusetts Court was:

> "We have already decided that the statute is valid; . . ."

The case consequently comes directly within the jurisdictional grant, and the motion to dismiss or affirm should be denied.

Respectfully submitted,

RICHARD WAIT.

Of Counsel:

MAYO A. SHATTUCK,

WILLIAM C. MADDEN.

POOR COPY

BLEED THROUGH